PERBADANAN PENGURUSAN SUNRISE GARDEN KONDOMINIUM v. SUNWAY CITY (PENANG) SDN BHD & ORS AND OTHER APPEALS

COURT OF APPEAL, PUTRAJAYA
YAACOB MD SAM JCA
AB KARIM AB JALIL JCA
LAU BEE LAN JCA
[CIVIL APPEAL NOS. P-01(A)-222-07-2017, P-01(A)-223-07-2017, P-01(A)-224-07-2017, P-01(A)-225-07-2017 & P-01(A)-226-07-2017]
7 MAY 2021

Abstract – *The planning permission granted to the developer for the proposed development of a piece of land, situated 76 metres above sea level with approximately 43% of the area having a gradient exceeding 25 degrees, thus falling under the category of 'hill land' under the Land Conservation Act 1960, was confirmed under the State Planning Committee ('SPC') Guidelines as a 'projek istimewa'. There was thus no requirement for the planning permission to be referred to the SPC for approval. The structure plan is a mere 'statement of policies' and not a piece of legislation that is legally binding on all parties and thus, the general prohibition against development on hill land in the structure plan was not absolute. Its principles need not be slavishly followed by the local authority when dealing with an application for planning permission. Therefore, the Penang State Appeal Board ('Appeal Board'), in setting aside the planning permission granted to the developer, had acted subjectively, arbitrarily and unreasonably.*

ADMINISTRATIVE LAW: *Judicial review – Certiorari – Application to quash decision of Penang State Appeal Board ('Appeal Board') to set aside planning permission for proposed development – Land located higher than 76 metres above sea level and approximately 43% of area having gradient exceeding 25 degrees – Whether proposed development complied with State Planning Committee ('SPC') Guidelines – Whether fell within definition of 'projek istimewa' under SPC Guidelines – Whether approval of SPC required – Whether Appeal Board misinterpreted policy in SPC Guidelines – Whether exceeded jurisdiction – Town and Country Planning Act 1976, ss. 22(2A), (4) & 23(1)(b)*

The first respondent, Sunway City (Penang) Sdn Bhd ('applicant'), the registered owner of a piece of land, was desirous of undertaking the development of the land and had, accordingly, submitted an application to the second respondent, Majlis Bandaraya Pulau Pinang ('MBPP') for planning permission to develop the land into a gated and guarded housing

scheme ('KM application'). The Town and Country Planning Department ('JPBD') replied and confirmed that they had no objection to the development, subject to certain conditions. Since the proposed development was on a land located higher than 76 metres above sea level and approximately 43% of the area had a gradient exceeding 25 degrees, the applicant submitted a geotechnical report for the development to Jawatankuasa Pengurusan dan Pembangunan Tanah Berisiko of the Public Works Department ('JKR') for consideration and received the approval accordingly. The applicant also received the confirmation from the Department of Environment that the applicant's Environmental Impact Assessment Report for the development was in compliance with s. 34A(2) of the Environmental Quality Act 1974. When the KM application was submitted there was no endorsement on the issue document of the land title to the effect that the land was subject to the provision of the Land Conservation Act 1960 ('LCA'). Some six months after the submission, upon being informed that the land had been declared as 'hill land' under the LCA, the applicant applied and obtained approval from the Penang State Authority for the excision of the land as 'hill land' under the LCA, subject to conditions. The applicant complied with the conditions imposed for the excision of the land, including, amongst others, payment of a sum of RM1,000,000 as 'bayaran khas'. The revocation of the declaration of 'hill land' under the LCA was confirmed *vide* Penang State *Gazette* Notification dated 12 June 2012. Pursuant to notices issued by MBPP pertaining to the KM application and their right to object to the KM application, the appellants ('respondents') as well as the respective owners of eight other neighbouring lands lodged their respective objection to the KM application. Despite the objection, MBPP approved the applicant's KM application subject to conditions ('planning permission'). Following the grant of the planning permission, the respondents appealed to the third respondent, the Penang State Appeal Board ('Appeal Board'), under s. 23(1)(b) of the Town and Country Planning Act 1976 ('TCPA'). At the conclusion of the hearing, the respondents' appeal was allowed and, in consequence thereof, the planning permission issued by MBPP was set aside. Being aggrieved and adversely affected by the decision of the Appeal Board, the applicant filed a judicial review application pursuant to O. 53 r. 2(4) of the Rules of Court 2012, seeking in principle, an order of *certiorari* to quash the decision of the Appeal Board. The High Court granted order in terms of the application for judicial review and in consequence, quashed the decision of the Appeal Board. Hence, these five appeals, which raised the following issues for determination: (i) status of the structure plan ('SP'); (ii) interpretation of the State Planning Committee Guidelines ('SPC Guidelines'); (iii) reliance on pelan dasar; and (iv) purported delegation of power under the SPC Guidelines.

Held (dismissing appeals)
Per Yaacob Md Sam JCA delivering the judgment of the court:

(1) When granting the planning permission, MBPP did not, on its own motion, decide that the proposed development qualified as a 'projek istimewa' but had instead applied the confirmation given by the JBPD. Having regard to the confirmation of the JPBD, which was responsible for carrying out the decisions and implementing the policies of the SPC, and applying the directions of the SPC as set out in para. c(i) of the SPC Guidelines, MBPP did not refer the planning permission application to the SPC for further consideration. MBPP granted the planning permission on the basis that part of the said land was zoned 'perumahan am' whilst another part zoned 'perumahan ketumpatan rendah' under the pelan dasar and, as such, the proposed development fell within category 2 of the definition of 'projek istimewa' under the SPC Guidelines. (para 90 & 91)

(2) Under s. 4(8) of the TPCA, the State Director of Town and Country Planning shall be the principal adviser to the Committee on matters relating to town and country planning and, as the Secretary of the Committee shall be responsible for carrying out the decisions and implementing the policies of the Committee, and in or for the purpose of discharging his functions under this subsection, he may draw upon the financial, manpower and resources of his department. Hence, the JPBD would be the rightful authority to construe the SPC Guidelines and to confirm the applicability thereof to a proposed development. Since the proposed development was confirmed by the JPBD as a 'projek istimewa' falling within category 2 of the SPC Guidelines, it was in line with the decision and policies of the SPC. In the circumstances, the approval of the SPC was not required. (paras 98 & 99)

(3) Despite the issuance of the SPC Guidelines to supplement the application of the structure plan, the pelan dasar of MBPP remained in force and applicable since there was no local plan drafted or approved following the structure plan coming into force. The pelan dasar had never been revoked at all material times. Therefore, the three subparagraphs of category 2 of the SPC Guidelines, particularly sub-para. (c) thereof, was to be read disjunctively rather than conjunctively so as to give effect to the true purpose and intention of the SPC Guidelines. Subparagraph (c) of category 2 was a stand-alone category to cover the situations where a particular land had been zoned as 'kawasan perumahan' under the pelan dasar of the MBPP before the inception of the structure plan and therefore capable of being developed as such. Accordingly, there was no necessity for an application for change of land use to be made and approved first. (paras 103-105)

(4) The SPC Guidelines did not 'delegate' the powers and/or discretion of the SPC to the MBPP to determine what was 'projek istimewa'. The SPC Guidelines formed a direction to the local planning authority to supplement the application of the structure plan by defining the categories of 'projek istimewa'. This direction was issued pursuant to s. 4(5) of the TPCA, and MPBB, as the local planning authority, guided by the JPBD, was duty bound to give effect to such direction. The Appeal Board had thus exceeded its jurisdiction having misinterpreted the policy in the SPC Guidelines, making its decision unreasonable. (paras 106 & 107)

(5) The applicant did not apply for the maximum density of 30 units/acre for 'Perumahan Am'. The overall development proposal showed that the proposed density was below the maximum. From the express provisions of s. 8(3) of the TCPA, a structure plan was merely a document setting out a state's general planning policies in respect of the development and use of land to be implemented in that state. The structure plan prescribed a general prohibition against development on lands situated higher than 76 metres above sea level and/or had a gradient exceeding 25 degrees. However, this prohibition was not absolute and found as an express exception in 'Dasar Khusus 3 Langkah 4' for 'projek istimewa'. The proposed development fell within that exception as confirmed by JPBD to the MBPP. Therefore, the findings by the Appeal Board that the proposed development could not constitute 'pembangunan terhad' under 'Dasar Khusus 4 Langkah 4' of the structure plan was subjective, arbitrary and unreasonable under the *Wednesbury* principles. (paras 109, 114, 115 & 124)

(6) The principle that the planning policies in the structure plan, including those found in s. 4.5.2 thereof, need not be slavishly followed by MBPP as the local planning authority when dealing with an application for planning permission. Section 22(2A) and s. 22(4) of the TCPA and the planning documents should be read objectively in a proper context, and it was an erroneous interpretation to say development of hill land was absolutely prohibited. Hence, there was not merits in the appeal that warranted the exercise of the appellate intervention. (paras 134 & 136)

Case(s) referred to:

Abdul Rahman Abdullah Munir & Ors v. Datuk Bandar Kuala Lumpur & Anor [2008] 6 CLJ 805 CA ***(refd)***

Chambers Of Trade And Commerce, Belfast City Council And North Down Borough Council, In The Matter Of [2000] NIQB 32 ***(refd)***

Hopkins Homes Ltd v. Secretary Of State For Communities And Local Government And Another; Cheshire East Borough Council v. Secretary Of State For Communities And Local Government And Another [2017] UKSC 37 ***(refd)***

Jill Ireland Lawrence Bill v. Menteri Bagi Kementerian Dalam Negeri Malaysia & Anor [2014] 1 LNS 1279 HC ***(refd)***

Johnson Tan Han Seng v. PP & Other Appeals [1977] 1 LNS 38 FC ***(refd)***

A *Law Pang Ching & Ors v. Tawau Municipal Council [2010] 2 CLJ 821 CA* ***(refd)***
Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 CLJ 65 FC ***(refd)***
R v. Wychavon District Council [2014] EWHC 1987 (Admin) ***(refd)***
Sri Bangunan Sdn Bhd v. Majlis Perbandaran Pulau Pinang & Anor [2007] 5 CLJ 673 FC ***(refd)***
B *Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union [1995] 2 CLJ 748 CA* ***(refd)***
Tesco Stores Ltd v. Dundee City Council [2012] UKSC 13 ***(refd)***

Legislation referred to:
Environmental Quality Act 1974, s. 34A(2)
C Rules of Court 2012, O. 53 r. 2(4)
Town and Country Planning Act 1976, ss. 2, 4(5), (8), 5, 8(3), 20A, 21(6), (7), 22(2), (3), 23(1)(b), 36

For the appellants - Gurdial Singh Nijar, Jesicca Ram Binwani, Abraham Au Thian Hui, Ramitra Ramarao & Meenakshi Raman; M/s Kanesh Sundrum & Co
D *For the 1st respondent/applicant - Cyrus Das, Christina Siew & Wang Kang Le; M/s Lim Kean Siew & Co*
For the 2nd respondent - Karin Lim & M Murgam; M/s Presgrave & Matthews
For the 3rd respondent - Charanjit Singh Mahinder Singh & Naizatul Zima Tajudin; SLAs Pulau Pinang

E *[Editor's note: For the High Court judgment, please see Sunway City (Penang) Sdn Bhd v. Lembaga Rayuan Negeri Pulau Pinang & Ors & Other Cases [2017] 1 LNS 623 (affirmed).]*

Reported by S Barathi

JUDGMENT

F **Yaacob Md Sam JCA:**

Introduction

[1] There are five appeals by the appellants before us against the decision of the High Court allowing the first respondent's application for judicial
G review. It was agreed by parties in all appeals that the decision of this court in respect of Civil Appeal No. P-01(A)-226-07-2017 (Semakan Kehakiman No. PA-25-8-14-2016) will bind the other four appeals.

[2] For the purpose of this judgment, the parties will be referred to as they were in the proceedings before the High Court.

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[3] Having heard the submission of the parties, we have deferred our decision to a date to be fixed. We now give our decision.

The Material Facts

Parties

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[4] The appellants/respondents are individual(s) and resident(s) in the vicinity of the applicant's proposed development on Lot 14345 Mukim 12, Daerah Barat Daya, Pulau Pinang (development).

[5] The first respondent/applicant (Sunway City Sdn Bhd) is a private limited company involved in the business of property development.

[6] The second and third respondents are the local planning authority and the State of Penang Appeal Board constituted under ss. 5 and 36 of the Town and Country Planning Act 1976 (TCPA) respectively.

Application For Planning Permission

[7] The applicant is the registered owner of a piece of land known as Lot 14345, Mukim 12, Daerah Barat Daya, Pulau Pinang held under Geran No. 81977 (the land), measuring a total area of 80.89 acres (327,361.83 square metres). The land is located within the Sungai Ara/Bayan Lepas area. The land is a first-grade title land with no restriction of land use. The land is however situated at elevation of more than 76 metres above sea level and approximately 43% of the area has a gradient exceeding 25 degrees.

[8] The applicant is desirous of undertaking the development on the land and had accordingly on 23 March 2011 submitted an application to the second respondent (Majlis Bandaraya Pulau Pinang/MBPP) for planning permission to develop the land into a gated and guarded housing scheme comprising the following:

	Proposed Development	No. of Units
A	3 storey bungalows (1 storey rooftop recreation area) (strata title)	62
B	3 storey zero lot bungalows (strata title)	30
C	7 storey condominium (1 storey rooftop recreation area) & 2 storey car park and recreation area	36
D	2 blocks (Block A & B) of 8 storey condominiums and 5 storey car park and recreation area	96
E	2 blocks (Block C) of 5 storey condominiums and 4 storey car park and recreation area	20
F	2 blocks (Block D & K) of 6 storey condominiums and 4 storey car park and recreation area	54
G	2 blocks (Block F & G) of 8 storey condominiums and 4 storey car park and recreation area	64
H	2 blocks (Block H & J) of 7 storey condominium and 4 storey car park and recreation area	70

1	2 blocks (Block L & N) of 13 storey condominiums and 2 storey car park and recreation area	104
J	1 block (Block M) of 16 storey condominiums and 2 storey car park and recreation area	64
K	1 unit 3 storey clubhouse and 2 storey car park & 1 unit of 2 storey clubhouse and 1 storey car park	–
	Total number of dwelling units	600

[9] The application for planning permission was given a reference number, MPPP/OCS/PM(1257)11 (LB) (kebenaran merancang/KM application) by the second respondent.

[10] Based and in accordance with standard procedures, the KM application was forwarded to various internal departments of the second respondent and also to external departments including the Town and Country Planning Department (TCPD/JPBD) for their respective input and comments.

Approval By Town And Country Planning Department (JPBD)

[11] On 19 April 2011, the JPBD replied and confirmed that they have no objection to the development as proposed subject to the conditions as laid out in the letter, amongst other things, as follows (exh. "AG5"):

> Didapati tapak cadangan terlibat sebagai 'Projek Istimewa' dan merujuk kepada 'Garispanduan Projek Istimewa Yang Dikenalpasti Di Dalam Rancangan Struktur Negeri Pulau Pinang 2020' Bil (K21-4/2009) telah dibentangkan di Mesyuarat Jawatankuasa Perancang Negeri (JPN) Bil. 4/2009 pada 21 Mei 2009 dan disahkan pada 18 Jun 2009.
>
> Jawatankuasa secara dasarnya bersetuju untuk meluluskan dan mengesahkan kertas kerja tersebut dan menetapkan bahawa terdapat dua (2) kategori projek istimewa yang dinyatakan dalam Rancangan Struktur Negeri Pulau Pinang 2020 (RSNPP 2020) di bawah perkara Dasar Khusus 3 Langkah 4 (DK3 L4).
>
> Cadangan pembangunan bagi permohonan ini terlibat di bawah kategori 2 iaitu:
>
> Kategori 2
>
> a) Pembangunan perumahan terdahulu di mana permohonan tukar syarat tapak kawasan berkenaan telah diluluskan di bawah perundangan Negeri bagi tujuan perumahan dan kelulusan tersebut telah disahkan sebelum kelulusan dan penerimapakaian RSNPP 2020.

b) Antaranya termasuk projek pembangunan yang pernah mendapat kelulusan kebenaran merancang atau;

c) Tapak yang ditunjukkan sebagai perumahan mengikut Pelan Dasar Perancangan dan Kawalan Pemajuan MPPP (sehingga RT diwartakan).

[12] *Via* letter dated 3 June 2011 to the applicant's consultant, the JPBD confirmed of the same (exh. "AG6").

Pelan Dasar Perancangan Dan Kawalan Pemajuan MPPP/PN-020 (PL/PP)

[13] Pursuant to the "Pelan Dasar Perancangan dan Kawalan Pemajuan MPPP/PN/-020 (PL/PP)" approved by the Penang State Planning Committee (SPC) on 16 July 1996 (pelan dasar), part of the land is zoned under "perumahan am" whilst another part is zoned under "perumahan ketumpatan rendah".

[14] Based on the zoning of the land under pelan dasar, the permitted density and the maximum density in respect of the land is as follows:

Zoning Under the Pelan Dasar	Permitted Density	Maximum Permitted Density
"Perumahan Am"	15 units/acre	30 units/acre (subject to payment of development charges)
"'Perumahan Ketumpatan Rendah"	6 units/acre	6 units/acre

Approval Of Jawatankuasa Pengurusan Dan Pembangunan Tanah Berisiko

[15] Since the proposed development is on the land located higher than 76 metres above sea level and with a gradient exceeding 25 degrees, the applicant also submitted a geotechnical report for the development to Jawatan Kuasa Pengurusan dan Pembangunan Tanah Berisiko of the Public Works Department (JKR) for consideration. The JKR *via* letter dated 31 January 2012 confirmed to the applicant that the Mesyuarat Jawatan Kuasa Pembangunan Tanah Berisiko bil No. 4/11 had on 29 September 2011 approved the applicant's geotechnical report for development subject to conditions as laid down therein.

Approval By The Department Of Environmental (DOE)

[16] The applicant also submitted an environmental impact' assessment report for development to the Department of Environment (DOE) for consideration. The DOE *via* letter dated 16 August 2011 to the applicant confirmed that the applicant's environmental impact assessment report for

the development is in compliance with s. 34A(2) of the Environmental Quality Act 1974 and accordingly approved the application subject to the conditions as laid down therein (exh. "AG9").

Approval Of The Penang State Authority For The Excision Of The Land As "Hill Land"

[17] At all material times when the KM application was submitted by the applicant to the second respondent, there was no endorsement on the issue document of the land title to the effect that the land is subject to the provision of the Land Conservation Act 1960 (LCA 1960) (exh. "AG20").

[18] However, sometime in September 2011, some six months after the submission of the KM application, the applicant was informed by the District and Land Office, Barat Daya, Pulau Pinang that the land had been declared as "hill land" under the LCA 1960. In view thereof, the applicant was advised to apply to the Penang State Authority for the excision of the said land as "hill land" under the LCA 1960.

Application For Excision Of The Land As "Hill Land" And Penang State Authority's Approval

[19] On 21 December 2011, the Penang State Authority had approved the applicant's application for the excision of the land as "hill land" under the LCA 1960 subject to conditions as laid down therein from the District and Land Office, Barat Daya, Pulau Pinang's letter dated 18 January 2012 to the applicant (exh. "AG10").

[20] The applicant had complied with the condition imposed for the excision of the land, including, amongst others, payment of a sum of RM1,000,000 as "bayaran khas". The revocation of the declaration of "hill land" under the LCA 1960 was confirmed *vide* Penang State *Gazette* Notification dated 12 June 2012 (exh. "AG11").

Objection To The KM Application By Individual(s)/Resident(s)

[21] Following the submission of the applicant's KM application, the second respondent pursuant to s. 21(6) of the TCPA 1976 issued notices to the owners of the 15 neighbouring lands, including the appellants/respondents, pertaining to the KM application and to inform such owners of their right to object to the KM application.

[22] In consequence, the respondent as well as the respective owners of eight other neighbouring lands lodged their respective objection to the KM application. A meeting was convened by the second respondent on 7 July 2011 pursuant to s. 21(7) of the TCPA to hear the objection against the KM application (exh. "AG12").

Approval Of KM Application

[23] Despite the objection taken by the respective neighbouring land owners, sometime in February 2012, the second respondent approved the applicant's KM application subject to conditions as set out in Borang C(1) dated 21 February 2012 (planning permission) (exh. "AG13").

[24] The respective land owners (respondents) were notified by the second respondent of the grant of the planning permission and of their right under s. 23(1)(b) of the TCPA 1976 to lodge an appeal to the State Appeal Board (the third respondent), if they so wished (exh. "AG14").

Decision Of The State Appeal Board

[25] Being aggrieved by the planning permission granted in respect of the proposed development, the defendant(s) lodged an appeal to the Penang State Appeal Board (PSAB/the third respondent) on 20 March 2012 and the appeal was registered as LR/PP/11/2012.

[26] There were eight other appeals that were registered before the PSAB. There were LR/PP/6/2012, LR/PP/7/2012, LR/PP/8/2012, LR/PP/9/2012, LR/PP/10/2012, LR/PP/12/2012, LR/PP/13/2012 and LR/PP/15/2012. At the outset of the PSAB's hearing, all parties involved agreed that since the nine appeals arose out of the same facts, they would be heard together. It was also agreed by all parties involved that the decision in appeal LR/PP/11/2012 would bind the other aforesaid appeals.

[27] Only one witness was called to give evidence during the hearing of the six appeals before the appeal board, namely Khadijah binti Abdul Karim (AW1), who is the Penolong Pegawai Perancang Kanan with Jabatan Perancang Bandar dan Desa and who appeared on behalf of the Director of the Jabatan Perancang Bandar dan Desa.

[28] At the conclusion of the hearing, on 27 January 2016, the PSAB delivered its decision with regard to appeal LR/PP/11/2012. The respondent's appeal was allowed with no order as to costs, and in consequence thereof, the planning permission issued by the second respondent was set aside (exh. "AG18"). As agreed earlier, the PSAB's decision in appeal LR/PP/11/2012 bound the other five appeals. Hence, the other five appeals were likewise allowed with no order as to costs.

Applicant's Application For Judicial Review

[29] Being aggrieved and adversely affected with the decision of the PSAB, that the applicant would be unable to proceed with the proposed development on the said land, the applicant filed this judicial review (JR) application before the High Court of Malaya in Penang pursuant to O. 53 r. 2(4) of the Rules of Court 2012.

[30] The application for the JR by the applicant dated 18 April 2016 (encl. 4) is, *inter alia*, for the following orders:

(i) A declaration that the first respondent (Penang State Appeal Board/ PSAB) had acted illegally and/or irrationally when it allowed the third respondent's appeal under Appeal No. LR/PP/11/2012 and set aside the planning permission bearing reference number JPB/KM/4654/A granted by the second respondent (Majlis Bandaraya Pulau Pinang) on 21 February 2012 in respect of the applicant's application for planning permission made under MPPP/OCS/PM(1257)/11(LB) (herein referred to as the said decision).

(ii) An order of *certiorari* to move this Honourable Court to quash the said decision made by the first respondent under Appeal No. LR/PP/11/ 2012 and communicated on 27 January 2016.

(iii) A declaration that the planning permission bearing reference number JPB/KM/4654/A granted by the second respondent on 21 February 2012 in respect of the applicant's application for planning permission made under MPPP/OSC/PM(1257)/11(LB) be confirmed and maintained and that the second respondent do give effect thereto.

[31] The applicant also filed five other applications for JR, namely, PA-25-9-04/2016; PA-25-10-04/2016; PA-25-12-04/2016; PA-25-13-04/2016; and PA-25-18-04/2016.

[32] On 6 June 2016, the High Court granted leave to the applicant for all orders prayed for in encl. 4 (*ex parte*).

Proceedings In The High Court

[33] The principal relief sought by the applicant in all the JR applications is for an order of *certiorari* to quash the decision of the Penang State Appeal Board that set aside the planning permission of the proposed development issued by the Majlis Bandaraya Pulau Pinang.

[34] Before the High Court, the parties raised the following issues for the court's determination, namely:

(i) whether the purposive construction of the policies in the structure plan and the SPC Guidelines in regard to "projek istimewa" by the Appeal Board is right or otherwise;

(ii) whether the interpretation accorded by the Appeal Board to the SPC's Guidelines as to what is it meant by "projek istimewa" is right or otherwise;

(iii) whether SPC's decision to delegate its power to ascertain whether the proposed development falls within the meaning of "projek istimewa" without referring to the SPC is valid or otherwise; and

(iv) whether the interpretation by the Appeal Board of the term "terhad" used in the structure plan in regard to "pembangunan terhad" is valid or otherwise.

[35] It is the applicant's submission that in the making of the said decision, the PSAB had acted illegally in that it had exceeded its power and jurisdiction conferred under the provisions of ss. 23 and 36 of the TCPA and had committed serious errors of law on the face of the record.

[36] After considering both the oral and written submission, the Penang High Court on 29 May 2017 granted an order in terms of the application for JR and in consequence thereof, quashed the decision of the Appeal Board.

The Appeals And Our Decision

[37] Aggrieved with the decision of the High Court, the appellants appealed to this court.

[38] For brevity, we do not propose to set out each of the submissions of learned counsel for the respective parties, except to state that the appeals raised the following issues or matters for our determination, namely:

(i) status of the structure plan (SP);

(ii) interpretation of the State Planning Committee Guidelines;

(iii) reliance on pelan dasar; and

(iv) purported delegation of power under the State Planning Committee's guidelines.

Interpretation Of The State Planning Committee Guidelines; Reliance Of Pelan Dasar; And Purported Delegation Of Power Under The State Planning Committee Guidelines (SPC Guidelines)

[39] We will first deal with the second, third and fourth issues together as they are inter-related.

[40] It is to be noted that at para. (45) of the learned High Court Judge's grounds of judgment, it was made clear that the appellant/respondent's focus before the Appeal Board as well as the High Court is to dispose the appeal based only on its interpretation of 'projek istimewa' in the SPC Guidelines and invalid delegation of power by the SPC to the second respondent, the Majlis Bandaraya Pulau Pinang.

[41] It is instructive to look into the provisions contained in the Structure Plan 2020 of the State of Penang (structure plan/SP).

[42] Paragraph 4.5.2 of structure plan contains provisions relating to "Hill Land" in the Island of Penang. This paragraph explains that "hill land" is land which is located exceeding 76 metres (250 feet) above sea level. This paragraph contains nine provisions from paragraph "Dasar Khusus 5 Langkah 1" till paragraph "Dasar Khusus 3 Langkah 9".

[43] To refine 'DK3' policy, the structure plan pursuant to 'Dasar Khusus 3 Langkah 1' (DK3 LT) prescribes a general preservation of hill lands gazetted under the LCA 1960. It provides as follows:

> Maintain the area exceeding level 76 metres (250 feet) and above as hill land/natural area including lands which is gazetted under the Land Conservation Act 1960 (land hill *Gazette*).

[44] 'Dasar Khusus 3 Langkah 2' (DK3 L2) in the structure plan contained a general prohibition against any form of development (including housing development). It provides as follows:

> Any municipality development which includes housing development, hotel, resort, commercial and industry, and agricultural activity is not permitted for:
>
> (i) Highland areas which is gazetted under the Land Conservation Act 1960;
>
> (ii) Any land which is located at the level exceeding 76 metres (250 feet); and/or
>
> (iii) Lands with a slope or gradient 25 degrees.

[45] 'Dasar Khusus 3 Langkah 3' (DK3 L3) requires lands which had been given approval by the authorities for excision from Hill Land *Gazette* to be subject to planning requirements and 'guidelines on risky or sensitive areas' which is applicable to State of Pulau Pinang,

[46] 'Dasar Khusus 3 Langkah 4' (DK3 L4) in the structure plan in particular is concerned with "hill land" cutting activity which shall be controlled by enforcing "guidelines on risky or sensitive areas".

[47] The paragraph reads as follows:

> Pembangunan secara terhad bagi projek istimewa di kawasan aras tanah ketinggian 76m (250 kaki) atau lebih memerlukan kawalan ketat dengan mematuhi garis panduan pembangunan kawasan tanah tinggi dan mana-mana garis panduan yang ditetapkan oleh kerajaan, dan mendapatkan kelulusan EIA serta mendapat kelulusan Jawatankuasa Perancang Negeri.
>
> (Translation: Limited development for 'Special Project' in areas where the elevation is above 76 metres (250 feet) or exceeding requires strict control by complying with 'Guidelines on Development of Hill Land Area' and any guidelines which is determined by the Government and obtained EIA approval and obtain State Planning Committee approval).

[48] In its grounds of decision, the Appeal Board held, amongst other things, as follows (exh. "AG19"):

(i) the Majlis Bandaraya Pulau Pinang (the second respondent) had failed to give proper or adequate consideration to s. 4.5.2 of the Rancangan Struktur Negeri Pulau Pinang 2020 (structure plan). "Projek istimewa"

under the structure plan must mean a project that possesses features which sets it apart from other (usually commercial) projects and cannot simply be what the SPC or the second respondent *per se* says it to be;

(ii) the second respondent had misconstrued the nature and ambit of category 2 of "projek istimewa" under the SPC's Guidelines. Subparagraphs (b) and (c) in category 2 under the guidelines are mere illustrations and must be read together with sub-para. (a) and as such, sub-para. (c) cannot be treated as a stand-alone provision that constitutes a separate class of exception;

(iii) to qualify under category 2 of "projek istimewa" under the Guidelines, the right to development must have been crystallised or vested before 28 June 2007, the date the structure plan came into effect. In other words, there must be an application for "tukar syarat" that had already been approved. As there was none in this case, the proposed development does not qualify as a "projek istimewa" under the Guidelines and under DK3 L4 of the structure plan;

(iv) the second respondent had not properly and adequately considered that even if the proposed development can be considered a "projek istimewa", DK3 L4 only allows limited development (pembangunan secara terhad). The proposed development that comprises 600 dwelling units can hardly be termed limited development and as such, the second respondent had not correctly applied its mind in respect of the KM application; and

(v) the purported delegation of powers found in para. c(i) of the Guidelines is invalid. The second respondent cannot therefore on its own decide that the proposed development qualified as a "projek istimewa" without reference to the SPC.

The Appellant/Respondent's Submission

[49] It was submitted for the appellant/defendant that the approval on the proposed development especially when it is an application involving development affecting sensitive hill lands (hill tops or hill slopes) must come from the SPC and this power cannot be delegated by the SPC to the Majlis Bandaraya Pulau Pinang (MBPP).

[50] Reference was made to ss. 20A and 22 of the TCPA 1960 which read as follows:

> Section 20A. Duty to consult
>
> It shall be the duty of every Federal and State Government department or agency to consult the Committee on any development activity that it proposes to carry out within the State.

Section 22. Treatment of application

(2A) Where an application submitted under this section involves:

...

(c) a development affecting hill tops or hill slopes, in an area designated as environmentally sensitive in a development plan, the Committee shall request from the Council its advice on the application submitted.

[51] The Council in this section refers to the National Physical Planning Council, the high-powered body whose functions include the improvement of the physical environment and towards the achievement of sustainable development in the country.

[52] Learned counsel for the plaintiff further submitted that the marginalisation of the SPC's function by delegating its power to an inferior body *via* para. c(i) of the guidelines, and especially in the context of 'projek istimewa' and limited development on hill slope, contravenes the intention of the TCPA. It was further argued that the inconsistency with the parent Act renders para. c(i) of the Guidelines to be invalid by virtue of s. 4(5) of the TCPA.

[53] The Appeal Board's ground of decision in this respect were as follows:

> The purported delegation of power found in paragraph c(i) of the Guidelines is invalid. The Second Respondent cannot therefore on its own decide that the proposed Development qualified as a "projek istimewa" without reference to the SPC.

[54] The Appeal Board basically held that the proposed development did not qualify as a 'projek istimewa'.

[55] Reference was also made to para. (25) of the Appeal Board's grounds of decision, which was submitted by learned counsel as rightly held by the Appeal Board, as follows:

> [25] The difficulty with this argument is that, generally speaking, the exercise of a discretion is non-delegable. From paras 5-158 to 5-179 in the (7th Ed) of *De Smith's Judicial Review*, the following principles relating to the delegation of the exercise of discretion can be called:
>
> (a) Where an authority vested with discretionary powers empowers one of its committees or subcommittees, members or officers to exercise those powers independently without any supervisory control by the authority itself, the exercise of the powers is likely to be held invalid;
>
> (b) The degree of control (before or afterwards) maintained by the delegating authority over the acts of the delegate or sub-delegate may be a material factor in determining the validity of the delegation.

(c) The *Carltona* principle, which allows 'devolvement' of power rather than 'delegation' of power, is one born of necessity practicality and inevitability. Government machinery will not work if, for example, a Minister is required to personally consider all matters coming under his ministry and to personally make each and every decision therefore.

[56] Learned counsel further contended that the learned judge erred in holding that the SPC's approval of the development plan was not required in this case.

[57] In support of his submission, learned counsel relied on *inter alia* the case of *Johnson Tan Han Seng v. PP & Other Appeals* [1977] 1 LNS 38; [1977] 2 MLJ 66 FC; and *Jill Ireland Lawrence Bill v. Menteri Bagi Kementerian Dalam Negeri Malaysia & Anor* [2014] 1 LNS 1279; [2015] 3 MLJ 743 HC.

The First Respondent/Applicant's Submission

[58] Learned counsel for the first respondent/applicant on the other hand, submitted that the SPC Guidelines provides that once a proposed development project has been ascertained to fall within either category 1 or 2 of the 'projek istimewa', then, "tidak perlu lagi dirujuk kepada Jawatan Kuasa Perancang Negeri bagi mempercepatkan pertimbangan permohonan".

[59] The structure plan was prepared by the State Director of the Jabatan Perancang Bandar dan Desa (State Director).

[60] After the SPC and the State Authority had approved the structure plan (SP), the State Director who prepared the SP had examined and reviewed the SP. From the comments obtained from departments which implement the SP, the State Director discovered there were several defects which need to be rectified.

[61] It was found that for purposes of implementing para. DK3 L4, the SP did not define clearly what is meant by the term 'projek istimewa' and what development will be permitted in areas which has been identified.

[62] It was also found that there are overlapping matters in the SP that involve the following:

(i) National Land Code;

(ii) structure plan;

(iii) pelan dasar.

[63] In para. DS30 L5 regarding housing in the SP, the paragraph provides that housing development will only be permitted in areas which have been identified.

[64] The defects that were found in the SP required rectification but to prepare the formal steps by amending the existing SP will take a lot of time. Therefore, the State Director informed the SPC on 21 May 2009 and 26 June 2009 which was attended by the Majlis Bandaraya Pulau Pinang's representative, that there is a need to modify the policies and proposals in the SP to overcome the problems and issues. In relation to these issues, the SPC had examined and reviewed issues regarding "projek istimewa" and had on 21 May 2009 and 26 May 2009, approved the working paper presented by the State Director and which is known as "Garispanduan Projek Istimewa Yang Dikenalpasti Didalam Rancangan Struktur Negeri Pulau Pinang 2020" or "SPC Guidelines" which is approximately two years after the gazetting of the SP in Government *Gazette* dated 28 June 2007.

[65] The SPC Guidelines was approved for proper management and to expedite consideration of planning application for development which has been identified as "projek istimewa".

[66] The SPC had determined what is meant by "projek istimewa" and classified it under two categories which is reproduced as follows:

(i) Kategori 1:

(a) Projek-projek infrastruktur utama berkepentingan Kerajaan, untuk kegunaan awam ...

(b) Projek-projek istimewa yang dimaksudkan adalah meliputi:

i. Projek kereta kabel

ii. Projek keretapi bukit;

iii. Apa-apa projek infrastruktur lain berkepentingan Kerajaan dan untuk kegunaan awam yang tidak dapat dielakkan untuk dibina di kawasan dimaksudkan.

(ii) Kategori 2:

(a) Pembangunan perumahan terdahulu di mana permohonan tukar syarat tapak kawasan berkenaan telah diluluskan di bawah perundangan Negeri bagi tujuan perumahan dan kelulusan tersebut telah disahkan sebelum kelulusan dan penerimapakaian RSNPP 2020 (*ie*, the Penang Structure Plan 2020);

(b) Antaranya termasuk projek pembangunan yang pernah mendapat kelulusan kebenaran merancang atau;

(c) Tapak yang ditunjukkan sebagai kawasan perumahan mengikut Pelan Dasar Perancangan dan Kawalan Pemajuan MPPP (sehingga RT diwartakan).

[67] The SPC when approving the SPC Guidelines had decided on 26 May 2009 that all applications for planning permission under category 1 and 2 of 'projek istimewa' is no longer required to be referred to the SPC in order to expedite consideration of the applications.

[68] This decision was made pursuant to the power of the SPC under s. 4(5) of the TCPA 1976.

[69] Section 4(5) of the TCPA provides:

> The State Planning Committee and its Functions
>
> 4(5). The Committee may from time to time give to any local planning authority directions not inconsistent with the provisions of this Act and the local planning authority shall give effect to such directions.

[70] The SPC which had approved the SP and also responsible under s. 4 of the TCPA 1976, for *inter alia*, arranging, controlling, planning and coordinating all planning activities within the State, had approved the SPC Guidelines.

[71] On 20 March 2011, the applicant had submitted an application for planning permission to the Majlis Bandaraya Pulau Pinang for the proposed development involving a gated and guarded housing scheme totalling 600 dwelling units on the said land.

[72] The planning application was circulated to all the relevant internal departments of the Majlis Bandaraya Pulau Pinang as well as external departments for their respective comments and requirements.

[73] Jabatan Perancang Bandar and Desa (JPBD) confirmed that they had no objection to the proposed development but subject to the imposed conditions. Likewise, the Jawatankuasa Pengurusan dan Pembangunan Tanah Berisiko of the Jabatan Kerja Raya (JKR) also had no objection to the proposed development subject to the imposed conditions. The environmental impact assessment (EIA) Report for the proposed development involving provision DK3 L4 was also approved by the Department of Environment (DOE) as in compliance with s. 34A(2) of the Environmental Quality Act 1974. The issue document of title of Lot 14345 however had no endorsement that the said land is subject to the LCA 1960.

[74] In view thereof, the Majlis Bandaraya Pulau Pinang proceeded to process the application for planning permission for the proposed development as it came under the category 2 of the SPC Guidelines without a need to refer or consult the SPC.

[75] On 21 February 2012, the Majlis Bandaraya Pulau Pinang granted planning permission to the applicant pursuant to s. 22(2) of the TCPA 1976, after taking into account all the relevant planning policies and the SPC Guidelines.

[76] Six months after the planning application was submitted, the applicant was informed by the Pejabat Daerah dan Tanah Daerah Barat Daya that the land had been declared as 'hill land' under the LCA 1960.

[77] The applicant promptly made an application to the State Authority, the highest authority in the State, to apply for the excision of the land as 'hill land'.

[78] On 21 December 2012, the State Authority approved the applicant's application for the excision of the land as 'hill land' under the LCA 1960. The revocation of the declaration of 'hill land' under the LCA 1960 was confirmed in the State Government *Gazett*e notification dated 12 June 2012. There is no statutory provision that the aforesaid excision must have been done before the coming into force of the structure plan.

[79] The applicant had complied with all the conditions imposed for the excision of the land as 'hill land' under the LCA 1960 including payment of a sum of RM1,000,000 as 'bayaran khas' to the State Authority.

[80] Learned counsel for the applicant submitted that the decision of the State Authority to approve the applicant's application for the excision of the land as 'hill land' under the Land Conservation Act 1960 after the planning permission was submitted and subsequently granted by the Majlis Bandaraya Pulau Pinang, only confirms that the State Authority agrees to exempt Lot 14345 from the general prohibition for development. Further, the revocation of the declaration of 'hill land' under the Land Conservation Act 1960 shows that the development proposal which has been submitted can be processed and be given consideration.

[81] Before the High Court, the decision of the Appeal Board was challenged on two grounds: firstly, on the basis of illegality or lack of jurisdiction; and secondly, on the basis of irrationality or '*Wednesbury*' unreasonableness.

[82] On the issue of illegality or lack of jurisdiction, it was contended for the applicant that the Appeal Board is a statutory tribunal 'constituted under s. 36 of the TCPA to hear appeal pursuant to s. 23 of the Act against the decisions of a local planning authority under s. 22(3) of the Act' (per Nik Hashim FCJ in *Sri Bangunan Sdn Bhd v. Majlis Perbandaran Pulau Pinang & Anor* [2007] 5 CLJ 673).

[83] Accordingly, the jurisdiction of the Appeal Board is circumscribed by the TCPA. Section 23 of the TCPA, *inter alia* provides:

> 23. Appeal against decision of local planning authority
>
> (1) An appeal against the decision of the local planning authority made under section 22(3) may be made to the Board within one month from the date of the communication of such decision to him, by:
>
> (a) an applicant for planning permission aggrieved by decision of a local planning authority to refuse planning permission or by any condition imposed by the local planning authority in granting planning permission; and

(b) a person who has lodged an objection pursuant to section 21(6) and is aggrieved by the decision of the local planning authority in relation to his objection.

[84] Learned counsel for the applicant submitted that the SPC Guidelines is not a decision made by MBPP as the local planning authority under s. 22(3) of the TCPA. Instead, the SPC Guidelines is formulated by the SPC in the exercise of its power under s. 4(5) of the TCPA.

[85] It was further submitted that the learned High Court Judge was correct in law when His Lordship held that 'the legality or otherwise of the Guidelines is not the decision of the MBPP that is amenable to appeal before the Appeal Board following the Federal Court decision in *Sri Bangunan Sdn Bhd v. Majlis Perbandaran Pulau Pinang* (*supra*).

[86] On the issue of irrationality/"Wednesbury" unreasonableness, it was submitted that the structure plan is a mere 'statement of policies' and a piece of legislation which is legally binding on all parties. Learned counsel cited the Court of Appeal decision in *Abdul Rahman Abdullah Munir & Ors v. Datuk Bandar Kuala Lumpur & Anor* [2008] 6 CLJ 805 where Abdull Hamid Embong JCA (as he was then) held "... it is also not a piece of legislation which imposes a public duty upon the first respondent to perform any specific act."

[87] It was further contended that para. c(i) of the SPC Guidelines, which provides that "selaras dengan penetapan dalam perkara b(iv) di atas, maka semua permohonan kebenaran merancang di bawah kategori 1 dan 2 tidak perlu lagi dirujuk kepada Jawatan Kuasa Perancang Negeri bagi mempercepatkan pertimbangan permohonan", is not an outright delegation of the SPC's non-statutory power and/or discretion to determine whether to approve a proposed development as 'projek istimewa' to MPPP. Instead, the SPC had exercised its functions by pre-determining two categories of development which constitute 'projek istimewa' under DK3 L4 of the structure plan. Thus, if a proposed development falls within any of the two pre-determined categories of 'projek istimewa', then for expediency, there is no requirement for the application for planning permission to be referred to the SPC for approval.

[88] Hence, it was submitted that para. c(i) of the SPC Guidelines does not at all give MBPP, as a local planning authority, absolute power and/or discretion to determine on its own whether a proposed development can be approved as 'projek istimewa'or otherwise. In other words, the MBPP need not refer applications for planning permission to the SPC only in situations where the proposed development falls within any of the two categories of 'projek istimewa' as pre-determined by the SPC in the SPC Guidelines.

[89] This is fortified by the ensuing para. c(ii) of the SPC Guidelines which provides that "apa-apa cadangan yang menyimpang dari perkara c(i) di atas, sama ada sesuatu projek berkenaan boleh diklasifikasikan sebagai 'projek istimewa' yang dimaksudkan atau sekiranya apa-apa pertikaian hendaklah hanya diputuskan oleh Jawatan Kuasa Perancang Negeri." Paragraph c(ii) of the SPC Guidelines therefore confirms that where a proposed development does not fall within the four corners of two the categories of one 'projek istimewa' as pre-determinded under the SPC Guidelines, such proposed development shall be referred to the SPC for determination.

[90] In this instant case, when granting the planning permission or kebenaran merancang, MBPP did not on its own motion decide that the proposed development qualified as a 'projek istimewa' but instead, had applied the confirmation given by the Jabatan Perancang Bandar dan Desa that the proposed development constitutes a 'projek istimewa' as it falls under category 2 of the SPC Guidelines. Therefore, having regard to the confirmation of the JPBD, which is responsible for carrying out the decisions and implementing the policies of the SPC, and applying the directions of the SPC as set out in para. c(i) of the SPC Guidelines, MBPP thus did not refer the planning permission application to the SPC for further consideration.

[91] MBPP granted the planning permission on the basis that part of the said land is zoned "perumahan am" whilst another part zoned "perumahan ketumpatan rendah" under the pelan dasar and as such, the proposed development would come within category 2 of the definition of "projek istimewa" under the SPC Guidelines.

[92] The Appeal Board held that the three subparagraphs of category 2 of the SPC Guidelines are to be read conjunctively and not disjunctively.

[93] For an ease of reference, the three paragraphs of category 2 are reproduced:

> (ii) Kategori 2:
>
> (a) Pembangunan perumahan terdahulu di mana permohonan tukar syarat tapak kawasan berkenaan telah diluluskan di bawah perundangan Negeri bagi tujuan perumahan dan kelulusan tersebut telah disahkan sebelum kelulusan dan penerimapakaian RSNPP 2020 (*ie*, the Penang Structure Plan 2020);
>
> (b) Antaranya termasuk projek pembangunan yang pernah mendapat kelulusan kebenaran merancang atau;
>
> (c) Tapak yang ditunjukkan sebagai kawasan perumahan mengikut Pelan Dasar Perancangan dan Kawalan Pemajuan MPPP (sehingga RT diwartakan).

[94] Hence, category 2 of the SPC Guidelines was construed by the Appeal Board to apply only to situations where the right to development must have been crystallised or vested before 28 June 2007 (*ie*, the date of the structure plan came into force) and there must be an application for "tukar syarat" that had already been approved before the inception of the structure plan.

[95] The learned High Court Judge held that the appeal board was wrong to have read the three subparagraphs of category 2 of the SPC Guidelines conjunctively. Instead, the learned High Court Judge's objective reading of category 2 is that sub-paras. (a) and (b) thereof are to be read conjunctively only; sub-para. (b) being an illustration of sub-para. (a), whereas sub-para. (c) is disjunctive and stand-alone provision.

[96] It is to be noted that the learned High Court Judge reinforced his interpretation of category 2 by referring to the unchallenged testimony of Khadijah binti Abdul Karim, the sole witness who appeared before the appeal board on behalf of the Director of JPBD. The said witness explained the basis for category 2 'projek istimewa' under the SPC Guidelines as follows:

> Sebelum garis panduan projek istimewa dibentangkan kepada Jawatankuasa Perancang Negeri, ada perbincangan diadakan dengan Majlis Perbandaran Pulau Pinang dan Majlis Perbandaran Seberang Perai bersama dengan pengarah Jabatan Perancang Pembangunan Majlis Perbandaran Pulau Pinang untuk membincangkan tafsiran projek istimewa. Semasa perbincangan, pengarah Jabatan Perancang Pembangunan ada memaklumkan bahawa berdasarkan Pelan Dasar MPPP yang juga telah diluluskan oleh Jawatankuasa Perancang Negeri di mana terdapat beberapa kawasan yang ditunjukkan sebagai kawasan pembangunan bercanggah dengan Rancangan Struktur Negeri 2020. Jawatankuasa Perbincangan Kecil berpendapat kawasan-kawasan yang telah dikenal-pasti sebagai kawasan pembangunan dalam Pelan Dasar MPPP sebahagian darinya ada telah diluluskan kebenaran merancang sebelum Rancangan Struktur Negeri 2020 diwartakan. Adalah tidak wajar untuk mengenepikan atau menidakkan kawasan yang telah dibenarkan untuk pembangunan. Oleh yang demikian, Jawatankuasa Kecil ini telah mengesyorkan supaya kawasan-kawasan yang terdahulunya telah mendapatkan kelulusan perundangan seperti ubah syarat dan juga kebenaran merancang, dan kawasan-kawasan yang telah dikenalpasti sebagai kaswasan perumahan mengikut Pelan Dasar MPPP dimasukkan di bawah kategori projek istimewa kerana kawasan itu tidak termasuk dalam kawasan yang dibenarkan untuk pembangunan dalam Rancangan Struktur Negeri Pulau Pinang.

[97] It is to be noted too that the evidence given by Khadijah binti Abdul Karim before the appeal board is consistent with the confirmation by the JPBD *via* letter 19 April 2011 to MBPP that the proposed development constitutes a 'projek istimewa' as it falls within category 2 of the SPC Guidelines.

[98] Under s. 4(8) of the TCPA 1976, the State Director of Town and Country Planning shall be the principal adviser to the Committee on matters relating to town and country planning and, as Secretary of the Committee, shall be responsible for carrying out the decisions and implementing the policies of the Committee; and in or for the purpose of discharging his functions under this subsection, he may draw upon the financial, manpower, and resources of his department.

[99] Hence, the JPBD would in fact be the rightful authority to construe the SPC Guidelines and to confirm the applicability thereof to a proposed development. The JPBD confirmed that the proposed development of the applicant is a 'projek istimewa' falling within category 2 of the SPC guidelines. It would mean that the proposed development is in line with the decision and policies of the SPC. In the circumstances, the approval of the SPC is not required.

[100] Learned counsel for the applicant further contended that the said land is a first-grade title land without any restriction of land use. There is no endorsement in the title that the land is placed under the LCA 1960. Since it is an 'open title' *ie*, the first-grade title, there is no requirement for an application for conversion or 'tukar syarat' to be made by the applicant to the State Authority. And after being informed that the land is subject to the Land Conservation Act 1960, the applicant promptly made an application to the State Authority for excision of the land as 'hill land'. The application was approved by the State Authority. Hence, it was also submitted that the applicant did in fact have a legitimate expectation, which has been crystallised and vested prior to the inception of the structure plan, that it can develop the said land into housing project and subject to the approval of planning permission by the local planning authority and all the respective Government departments. The JPBD, Land Office, DOE, JKR and Jawatankuasa Pengurusan dan Pembangunan Tanah Berisiko all had no objections to the proposed development. The DOE *vide* letter dated 16 August 2011 confirmed that the EIA report for the proposed development complies with s. 34A(2) of the Environmental Quality Act 1974 and therefore the EIA report was accordingly approved. The approval of the EIA report is in accordance with the requirement of DK3 L4 which provides such development shall obtain EIA approval. The applicant had complied with all the conditions for the excision of the said land as 'hill land' under the Land Conservation Act 1960 including payment of a sum of RM1 million as 'bayaran khas' mandated by the State Authority.

[101] To support his argument, learned counsel cited the case of *Law Pang Ching & Ors v. Tawau Municipal Council* [2010] 2 CLJ 821 which made reference to the Federal Court decision in *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 CLJ 65; [1999] 3 MLJ 1 which held, *inter alia* that the doctrine of legitimate expectation had both procedural and substantive dimensions.

[102] Having in mind that the provisions of the pelan dasar and/or the National Land Code could form the basis of a legitimate expectation, it is not a surprise that the SPC recognises the situations by the formulated category 2 in the SPC Guidelines.

[103] It is to be noted that despite the issuance of SPC guidelines to supplement the application of the structure plan, the pelan dasar of the MBPP remained in force and applicable since there is no local plan drafted or approved following the structure plan coming into force. The pelan dasar has never been revoked at all material times.

[104] In the circumstances, we agree with the learned High Court Judge that the correct reading of the SPC Guidelines would be that the three subparagraphs of category 2 of the SPC Guidelines, particularly sub-para. (c) thereof, is to be read disjunctively rather than conjunctively so as to give effect to the true purpose and intention of the SPC Guidelines. We further agree with the learned High Court Judge that sub-para. (c) of category 2 is a stand-alone category to cover the situations where a particular land has been zoned as 'kawasan perumahan' under the pelan dasar of the MBPP before the inception of the structure plan and therefore capable of being developed as such.

[105] We are of the view that to apply and construe category 2 of the SPC Guidelines to only on projects where an application for the change of land use of the plot concerned had already been approved before the coming into force of the 'Penang Structure Plan 2020', as the Appeal Board did, leads to an inconsistency and absurdity, particularly with regard to the applicant's land which is first grade title without restriction of land use. Accordingly, it would follow that there is no necessity for an application for change of land use or 'tukar syarat' to be made and approved first.

[106] To our mind, the SPC Guidelines did not 'delegate' the powers and/or discretion of the SPC to determine what is 'projek istimewa' to the Majlis Bandaraya Pulau Pinang. The SPC Guidelines in fact, forms a direction to the local planning authority to supplement the application of the structure plan by defining the categories of 'projek istimewa'. This direction is issued pursuant to s. 4(5) of the TCPA 1976 and the second respondent, the MBPP as the local planning authority (guided by the JPBD) is duty-bound to give effect to such direction.

[107] We further agree with the learned High Court Judge that the appeal board in this case had exceeded its jurisdiction as the Appeal Board had committed an error of law in the sense that it has misinterpreted the policy in the SPC Guidelines making its decision unreasonable.

[108] In the Court of Appeal case of *Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union* [1995] 2 CLJ 748, Gopal Sri Ram JCA (as he then was) held as follows:

> In my judgment, the true principle may be stated as follows. An inferior tribunal or other decision making authority, whether exercising a *quasi*-judicial functions or purely an administrative function has no jurisdiction to commit an error of law. Henceforth, it is no longer of concern whether the error of law is jurisdictional or not. If an inferior tribunal or other public decision taker does make such an error, then he exceeds his jurisdiction. So too is jurisdiction exceeded where resort is had to an unfair procedure (see *Raja Abdul Malek v. Setiausaha Suruhanjaya Pasukan Polis* [1995] 1 CLJ 619), or where the decision reached is unreasonable, in the sense that no reasonable tribunal similarly circumstanced would have arrived at the impugned decision.
>
> It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law for the categories of such an error are not closed. But it may be safely said that an error of law would be disclosed if the decision-maker asks himself the wrong question or take into account irrelevant considerations or omits to take into account relevant considerations (what may be conveniently termed an *Anisminic* error) or if he misconstrues the terms of any relevant statute, or misapplied or mis-states a principle of the general law.
>
> Since an inferior tribunal has no jurisdiction to make an error of law, its decision will not be immunized from judicial review by an ouster clause however widely drafted.

[109] We also noted that the applicant did not apply for the maximum density of 30 units/acre for "perumahan am". The overall development proposal showed that the proposed density is below than the maximum density. Pursuant to the proposed density, the Majlis Bandaraya Pulau Pinang had processed the development proposal as falling within the meaning of the term a 'limited development'.

[110] The appeal board held that even if the proposed development can be considered as a 'projek istimewa', DK3 L4 only allows limited development (pembangunan secara terhad) and that the proposed development which consists of 600 dwelling houses "can hardly be termed as limited development" and hence, the MBPP had not correctly applied its mind when granting the planning permission (KM).

[111] The learned High Court Judge held that the Appeal Board had failed to take into consideration of the following facts:

(i) the structure plan itself does not define what is considered as 'pembangunan secara terhad' under DK3 L4;

(ii) having regard to the total area of the said land, *ie*, 80.89 acres, the proposed development only has an average density of 7.4 units/acre. MBPP had in fact confirmed that as the density of the proposed development is less than the 'ketumpatan minima', the proposed development is in fact a 'pembangunan terhad';

(iii) the landowner (the applicant) may, subject to payment of development charges, apply to construct up to 909 units of dwelling houses on the land;

(iv) the evidence of the sole witness Khadijah binti Abdul Karim before the appeal board had explained that 'dihadkan' or 'terhad' in the context of the structure plan merely means 'dengan syarat'.

[112] We also noted that the learned High Court Judge further observed that no evidence whatsoever was adduced before the appeal board as to what would be considered sustainable or reasonable housing development on the said land.

[113] As alluded earlier, the structure plan is a mere 'statement of policy' (see *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* (*supra*)). It is also not a piece of legislation which imposes a public duty upon the MBPP to perform any specific act (see *Abdul Rahman Abdullah Munir & Ors v. Datuk Bandar Kuala Lumpur & Anor* (*supra*).

[114] DK3 L1 and L2 of the structure plan do prescribe a general prohibition against development on lands situated higher than 76 metres above sea level and/or has a gradient exceeding 25 degrees. However, this prohibition is not absolute and found as an express exception in DK3 L4 for 'projek istimewa'. The proposed development falls within that exception as confirmed by the JPBD to the MBPP.

[115] In light of the above facts, we fully agreed with the learned High Court Judge that the findings made by the Appeal Board that the proposed development cannot constitute 'pembangunan terhad' under DK4 L4 of the structure plan is subjective, arbitrary and unreasonable under *Wednesbury* principles.

[116] We also find no basis to conclude that the learned High Court Judge was plainly wrong on the issue of the interpretation of the SPC Guidelines. We are in total agreement with the learned High Court Judge on his findings.

Status Of Structure Plan

[117] We shall deal now on the first issue, the status of Penang State Structure Plan (SP).

[118] The learned High Court Judge held that the SP "is merely one of policy" and did not bind the planning authority.

[119] Both the decision of the appeal board as well as the High Court also revolve around the Rancangan Struktur Negeri Pulau Pinang 2020 (RSNPP 2020) and in particular "Dasar Khusus 3 (DK3)". Hence, it would be pertinent to determine the status of the said SP.

[120] The RSNPP 2020 is the structure plan currently in force in the State of Penang, having been approved by the State Planning Committee and assented by the State Authority under the provisions of the TCPA 1976.

[121] The scope and purpose of the plan is reflected in the introductory words to the RSNPP 2020 as follows:

> Rancangan Struktur Negeri Pulau Pinang (RSNPP) 2020 disediakan selaras dengan kehendak dan peruntukan Bahagian III Akta Perancangan Bandar dan Desa 1976 (Akta 1972). Penyediaan RSNPP ini adalah untuk melengkapkan sistem perancangan fizikal di samping menterjemahkan dasar-dasar Rancangan Fizikal Negara (RFN). Ini juga bertujuan untuk menyelaraskan dasar-dasar Rancangan Pemajuan sedia ada di samping saling melengkapi perancangan Pembangunan Negeri semasa dan masa hadapan. *RSNPP merupakan satu dokumen pernyataan bertulis mengandungi dasar-dasar perancangan strategik dan cadangan-cadangan Pembangunan kegunaan tanah serta hala tuju perancangan masa hadapan bagi Negeri Pulau Pinang.* Ianya disokong dengan Gambar Rajah utama serta Pelan-pelan Subjek bagi memperjelaskan dasar-dasar perancangan Strategik dan cadangan-cadangan yang dikemukakan. (emphasis added)

[122] In "*Malaysian Town and Country Planning Law and Procedure*", the learned author described a structure plan as follows:

> A structural plan is a written statement of the state's strategic policies and proposals containing general land use proposals without providing precise allocations and containing the broad framework for planning in the state's area. Basically structure plans have three functions. First, a structure plan should explain the policy and general proposals of the development and use of land in that State; thereby giving guidance on issues of structural importance. Secondly, structure plan must demonstrate the integration and utilization of national and state policies within the state. Finally, there were to provide the basis for local plans.

[123] Section 8(3) of the TCPA provides as follows:

> The draft structure plan for the State shall be a written statement:
>
> (a) formulating the **policy and general proposals** of the State Authority in respect of the development and use of land in that State, including measures for the improvement of communications, the management of traffic, the improvement of socio-economic well-being and the promotion of economic growth, and for facilitating substantial development;

(b) stating the relationship of those proposals to general proposals for the development and use of land in the neighbouring areas that may be expected to affect that area; and

(c) containing such other matters as may be prescribed of as the Council or Committee may in any particular case specify. (emphasis added)

[124] From the express provisions of s. 8(3) of the TCPA, a structure plan is therefore merely a document setting out a State's general planning policies in respect of the development and use of land to be implemented in that State.

[125] Section 22(2) of the TCPA provides, *inter alia*, as follows:

In dealing with an application for planning permission, the local training authority shall take into consideration such matters as are in its opinion expedient or necessary for proper planning and in particular:

(a) the provisions of the development plan, if any;

(aa) the direction given by the Committee, if any ...

[126] "Development plan" is defined under s. 2 of the TCPA as follows:

(a) the local plan for the area; or

(b) if there is no local plan for the area, the structure plan for the area.

[127] Learned counsel for the respondent submitted that all developments undertaken by the land owner must comply with the SP. SP is a sacrosanct document. It was further submitted that the SP contains absolute prohibition on the grant of development permission *ie*, for housing, hotels, resort, commerce, industry, agriculture on hill land above 250 feet which has a gradient exceeding 25 degrees. It was also submitted that the SP superseded the pelan dasar which is only applicable to the 1987 Penang Structure Plan. Thus, the MBPP cannot make use the pelan dasar in allowing the applicant's application for the proposed development. The SP was approved in 2007 and gazetted on 28 June 2007, Hence, the SP has legal status and cannot be disregarded (*Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* (*supra*). It was also contended that under s. 22(4) of the TCPA there is an absolute bar to the grant of planning permission if the development would contravene any provision of the development plan. It was submitted that the learned High Court Judge relied on s. 22(2) but had failed to take into consideration s. 22(4) of the TCPA that bar the granting of planning permission if the development would contravene any provision of the development plan. Thus, the granting of the planning permission by the MBPP is flawed. Learned counsel cited the case of *R v. Wychavon District Council* [2014] EWHC 1987 (Admin); and *Tesco Stores Ltd v. Dundee City Council* [2012] UKSC 13 to support his argument.

[128] These cases make the following points:

(i) The development plan is a carefully drafted and considered statement of policy. It guides the decision of the planning authorities.

(ii) It informs the public of the approach which will be followed by planning authorities in decision-making.

(iii) The policy of the development plan must be understood – interpreted objectively and read in the proper context.

(iv) It should not be departed from unless there is a good reason.

[129] Learned counsel for the respondent also cited para. 4.5.2 of the SP headed 'Hill land' which states that pressures posed by the development of hill land of that height and gradient was increasingly threatening; and stressed the need to *Gazette* land as 'kawasan pengekalan' as well as enforce guidelines to ensure that such land would continue to be conserved to guarantee the securing of a balanced ecology of the State. Thus, the SP proposed measures to control cutting such hill land through the enforcement of guidelines of risk areas.

[130] Learned counsel for the applicant on the other hand, submitted that the principle has been recognised and that although the structure plan shall be considered by MBPP in dealing with an application for planning permission by virtue of the provisions under s. 22(2) of the TCPA, it need not be followed or complied with slavishly. Learned counsel cited the Federal Court decision in *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* (*supra*) that "the provisions of the development plan do not mean that the local planning authority must slavishly comply with it. It will suffice if it considers the development plan without incurring the obligation to follow it."

[131] Learned counsel for the applicant also cited the case of *Chambers of Trade and Commerce, Belfast City Council and North Down Borough Council, in the matter of* [2000] NIQB 32 of which the Queen's Bench Division had rejected the submission by the QC that compliance with the criteria contained in para. 39 of the PPS5 (planning policy statement 5) is mandatory to the extent that any failure to comply automatically prohibits the granting of this type of planning permission.

[132] Hence, learned counsel for the applicant submitted that failure by a local planning authority to adhere strictly with any of the matters prescribed under s. 22 of the TCPA, including the provisions in the structure plan, would not in itself render the grant of planning permission null and void and/or *ultra vires*.

[133] On the issue of the pelan dasar, it is not in dispute, part of the said land is zoned under 'perumahan am' whilst another part is zoned under 'perumahan ketumpatan rendah'. *Via* directions made pursuant to s. 4(5) of the TCPA 1976, the SPC directed the MBPP to "menggunapakai secara keseluruhan" the pelan dasar. As there is as yet no gazetted local plan for the area under the authority of the MBPP, the pelan dasar, for all intents and purposes, serves the function of a local plan. Particularly, the pelan dasar specifically provides for, amongst other things, the permitted land use (*ie*, zoning) of all land within the areas under the authority of the MBPP on a lot-to-lot basis.

[134] Be that as it may, we agree with the submission of learned counsel for the applicant that the structure plan prescribes the general policies for development within the State of Penang and is not to be treated as a piece of legislation. Thus, the principle that the planning policies in the structure plan, including those found in s. 4.5.2 (DK3) thereof, need not be slavishly followed by MBPP, as the local planning authority, when dealing with an application for planning permission (see *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 CLJ 65 FC). We are of the view that s. 22(2A) and s. 22(4) of the TCPA and the planning documents should be read objectively in a proper context and it is an erroneous interpretation to say development of hill land is absolutely prohibited (see *Hopkins Homes Ltd v. Secretary of State for Communities and Local Government and another; Cheshire East Borough Council v Secretary of State for Communities and Local Government and another* [2017] UKSC 37).

[135] We are in total agreement with the learned High Court Judge on his findings and we therefore affirm the learned judge's findings and decision.

Conclusion

[136] For all the foregoing reasons, we find there are no merits in the appeal which warrant us to exercise our appellate intervention. We unanimously dismiss this appeal. As agreed by all the appellants, the determination of this Appeal No. P-01(A)-226-07-2017 binds all the appellants in Appeal No. P-01(A)-222-07-2017; Appeal No. P-01(A)-223-07-2017, Appeal No. P-01(A)-223-07-2017, Appeal No. P-01(A)-22-07-2017 and Appeal No. P-01(A)-225-07-2017. We made no order as to costs.